SUPREME COURT, U. S.
FILED
SEP 26 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73 550

TEXASGULF INC., *Petitioner*

v.

FEDERAL POWER COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 1973

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Texasgulf Inc.[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on June 28, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. A, *infra,* pp. 1a-23a) is not yet reported.

[1] The name of Texas Gulf Sulphur Company (used in the pleadings in the Court below) has been changed to Texasgulf Inc.

The opinions and orders of the Federal Power Commission (R. 3429-3464, 3678-3686) are reported at 47 F.P.C. 245 and 1021.

JURISDICTION

An order of stay of the judgment was entered by the Court of Appeals on September 25, 1973 to afford opportunity for review of the June 28, 1973 opinion by this Court. The jurisdiction of this Court is involved under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether, in view of Section 1(c) of the Natural Gas Act, natural gas transmission systems serving intrastate markets near the coast should be deprived of their exemption from Federal Power Commission jurisdiction simply because the company owning the local system introduces gas into it from pipelines which it owns which, for economic, engineering and ecological reasons, are designed to bring natural gas to high ground from wells in the coastal marshes and offshore waters to serve both intrastate and interstate markets?

STATUTE INVOLVED

Section 1(c) of the Natural Gas Act, 68 Stat. 36, 15 U.S.C. 717(c), provides as follows:

> "(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities

used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation of a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction."

STATEMENT

This case involves the jurisdictional status under Section 1(c) of the Natural Gas Act, of a portion of the pipeline system of United Gas Pipe Line Company (United) serving the City of New Orleans and an area south and southwest of that city with natural gas purchased by United from producers in gas fields in the coastal marshes of Louisiana and the adjacent offshore area (the "Green System-East").

United used the Green System-East to transport gas, which it purchased from producers in Louisiana fields, for sale at wholesale to public utilities and for direct sales to industrial [2] and public utility power plant customers. For over thirty years this part of United's pipeline system was employed solely in an intrastate business. Therefore, it was not subject to the jurisdiction of the Federal Power Commission.

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[2] Texasgulf purchases gas from United under a long-term firm contract for use in its Bully Camp Frasch Process mine located in the coastal marshes of Lafourche Parish, Louisiana. The mine is supplied by United from one of the pipelines in the Green System-East.

The Louisiana Public Service Commission regulated the resale rates of United on the Green System-East and the transportation of gas to local gas distribution systems.[3] In 1964, Article 6, Section 4 of the Louisiana Constitution which broadly states the powers of the Louisiana Commission was amended to provide that the Commission may not regulate United's direct sales to industries.[4]

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[3] See United Gas Pipe Line Co., 34 P.U.R. 3d 78 (1960), aff'd as modified, *United Gas Pipe Line Co. v. Louisiana Public Service Commission*, 241 La. 667, 130 So.2d 652 (1961). The powers of the Louisiana Public Service Commission are stated as follows (LSA-R.S. 45:301-302):

"301. The transportation or sale of natural gas by pipe lines to local distributing systems for resale is affected with a public interest and such pipe lines, appurtenances and facilities to the extent of such transportation or sales are public utilities subject to the jurisdiction of the Louisiana Public Service Commission.

"302. The Commission shall supervise, govern, regulate and control the transportation or sale of natural gas moving by pipe line to local distributing systems for reseale for the purpose of fixing and regulating the rates charged and the service furnished by such public utilities in connection with such transportation or sale.

"The power, authority and duties of the Commission shall affect and include all matters and things directly connected with, concerning and growing out of the service given or rendered by such pipe lines transporting or selling natural gas to local distributing systems for resale with respect to any such transportation or sales."

[4] See LSA-Const. Art. 6, § 4, which provides in pertinent part that "the Commission shall have no power or authority to supervise, govern, regulate, and control any aspect of sales of natural gas direct to industrial users for fuel or for utilization in any manufacturing process, whether such direct sales are made by natural gas producers, natural gas pipeline companies, or any other person engaging in such sale of natural gas."

Prior to adoption of this amendment, the Commission apparently recognized that it had limited jurisdiction over direct sales under Louisiana Revised Statutes of 1950, Title 45, § 301, *et seq.* See *United Gas Pipe Line Co.*, 34 P.U.R. 3d at 82.

Beginning in 1965, without the consent of the Federal Power Commission or the knowledge of its customers on the Green System-East, United began to supplement gas supplies on that system with gas purchased from producers in other coastal and adjacent offshore fields which United used as sources of gas for its interstate markets. As a consequence, some of the gas purchased from producers for ultimate consumption in the State of Louisiana through the Green System-East was (and is) transported from the wellhead for a relatively short distance in a commingled stream with gas going to United's interstate markets.

In the case of the particular pipeline of United serving Petitioner, the commingling of gas was accomplished by extending a gathering line located in the coastal marshes, which had served only the Green System-East, into shallow waters of the Gulf of Mexico within the three mile limit, tieing the old intrastate gathering line at an onshore point into United's pipeline carrying gas to the interstate market, and requiring the producers to build the gathering lines required to bring the gas from the offshore fields to the end of United's newly extended gathering line.

United could have constructed separate lines connecting its new gas sources to the Green System-East and to the interstate market. Instead, United simplified construction, reduced the number of gathering lines built, commingled gas supplies, economized on pipeline costs to be borne by consumers, and limited the ecological disturbances caused the particularly sensitive marshlands and adjacent shallow offshore areas by pipeline construction.

The Commission decisions below—In a decision rendered in January 1972, the Commission held that it acquired jurisdiction over this historically intrastate system at the moment that United first injected gas into it from United's pipelines carrying gas to interstate markets. The Commission declined to hold the Green System-East exempt from its jurisdiction under Section 1(c) of the Natural Gas Act because of an alleged failure to meet the qualifying conditions of that provision: service of United and its facilities are not subject to regulation by a State Commission because the Louisian Public Service Commission has no jurisdiction over United's direct industrial sales; and the gas is not received by United from another person within or at the boundary of the State because United's Green System-East is connected directly to United's interstate system, and there is no purchase from "another person" at the point where the gas passes from the interstate pipeline to the Green System-East.[5]

The Court decision below[6]—The Court of Appeals affirmed the Commission's finding that it had acquired jurisdiction due to the commingling of gas in the pipelines carrying gas to the interstate markets, and ruled that Section 1(c) did not exempt the Green System-East from Commission jurisdiction because "a facility

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[5] 47 F.P.C. at 261.

[6] In *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, 456 F.2d 326 (5th Cir. 1972), the Court of Appeals had held that the Commission had no jurisdiction over the Green System-East. This Court reversed on the ground that the Court of Appeals had erred in deciding that issue before the Commission had exercised its primary jurisdiction over the question in proceedings then pending. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972).

cannot be exempt if the 'person' who receives the gas is the same 'person' who transmits the gas into the facility in the first instance. In effect, the requirement of a 'person-to-person' exchange at the point of receipt ensures that the statutory exemption will not extend to local branches of a single interstate system, all of which is operated by the same 'person'." (App. A, p. 19a)

REASONS FOR GRANTING THE WRIT

This case represents an important question as to the intent and purpose of Section 1(c) of the Natural Gas Act, the so-called Hinshaw Amendment, which was enacted by Congress in 1954 to nullify the extension of Commission jurisdiction into the domain of State public utility regulation arising from this Court's decision in *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950).[7]

It affords this Court its first opportunity to construe this remedial statutory provision, and to do so in a context where the intended restoration of complementary federal and state regulations can be effected while discouraging the construction of duplicative pipelines in coastal and adjacent offshore areas and strengthening competition for onshore and offshore supplies by public

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[7] "The difficulty giving rise to the need for this bill is that under certain interpretations of the Federal Power Commission, principally the interpretation upheld by the Supreme Court in the *East Ohio* case (see the appendix for the text of this case), the Commission has undertaken regulation of some activities of certain companies engaged in the distribution of natural gas whose operations take place wholly within a single State and which can be completely regulated by the respective States. * * * This bill eliminates this duplication by leaving the jurisdiction over these companies exclusively in the States, as always had been intended." "Amending the Natural Gas Act," H. Rep. No. 899, 83d Cong., 1st Sess., p. 2.

utilities exempt from Federal Power Commission regulation under Sections 1(b) [8] or 1(c) of the Act.

1. It was estimated in 1970 that there is a potential undiscovered gas supply of 36 trillion cubic feet under the continental shelf running along the eastern seaboard from Georgia to Maine, and 39 trillion cubic feet of potential supplies under the coastal shelf off Florida, Alabama and Mississippi.[9] In view of the gas shortage being experienced in this country,[10] it has become imperative that these supplies be developed as quickly as possible, be distributed equitably and without overthrowing the regulatory system created by Congress under the Natural Gas Act.

There are many gas pipeline systems serving local markets adjacent to the coastlines of the United States now exempt from Federal Power Commission regula-

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[8] "(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 15 U.S.C. 717(b).

[9] See map in Appendix B hereto taken from figure 6 to "Potential Supply of Natural Gas in the United States (as of December 31, 1970)" published by the Potential Gas Committee, October 1971. "Potential supply of natural gas" as used in this report means supplies of natural gas to be discovered in the future, sometimes referred to as undiscovered potential supplies and *does not* include proved recoverable reserves or past production.

[10] As recognized by this Court in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

tion under Section 1(c) of the Act.[11] These would lose that exemption were they, like United, to extend their lines offshore and attempt, in the interest of economy and ecology, to purchase newly-discovered gas from producers and to bring the gas ashore in a commingled stream for both their own markets and the more distant interstate markets. Yet this exclusionary result flows from the unreasonably restrictive construction of the Hinshaw Amendment adopted by the Court below.

2. In recent years the intrastate markets have had a significant advantage over the interstate markets in contracting for new supplies of natural gas from onshore fields.[12] Consequently, a ruling by the Federal Power Commission that United's Green System-East formerly deemed intrastate was now subject to the Commission's jurisdiction serves to deprive that system and the consumers served from it, of its important ability to compete for new gas supplies as part of the intrastate market. This is a case where the imposition of Commission jurisdiction has created a quarantine, a highly-prejudicial result which was not called for by the circumstances and could be avoided by a proper appreciation of what Congress intended.

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[11] See Appendix C hereto.

[12] This situation was concisely summarized by the Administrative Law Judge in his initial decision issued December 20, 1972 in *Area Rate Proceeding (Permian Basin Area)*, Docket No. AR70-1 (Phase I) (mimeo p. 8):

> "• • • What has happened in Permian is that the intrastate market has taken, in the recent past, a lion's share of the new gas discovered at a price just over or near the area rates. In fact, according to the evidence of record, several intrastate purchasers in Permian have standing offers to the producers to better interstate ceilings by one or two cents per Mcf. • • •"

3. All of the gas marketed by United from the Green System-East is purchased by United from another person. All of it is purchased by United from producers in or near the coastal and offshore fields where it is produced. The fact that the gas thus consumed in Louisiana on the Green System-East is for a time carried by pipelines under coastal waters and marshes in a commingled state with gas destined for the interstate market does not change this plain fact. To require separate companies to own the pipelines at the point of delivery is to add a requirement not stated in the statute nor required to effectuate its purposes.

4. The Commission has in the past found it no offense against the purposes of Section 1(c) to hold exempt from its regulation a branch of an integrated pipeline system.

> "Utah Gas' remaining contentions raise the question whether a Section 1(c) exemption may be issued covering facilities of a natural gas company which, while satisfying each of the explicit statutory criteria, are interconnected with interstate facilities which remain subject to our jurisdiction. In our view, in the absence of any statutory provision or legislative history compelling a contrary view, the question must be answered in the affirmative otherwise we would be merely encouraging the atomization of corporate arrangements to avoid regulation and creating additional managerial and administrative burdens without reaping any public advantages whatsoever. Indeed, one of the very objectives of the Hinshaw amendment was to obviate the need for natural gas companies to engage in corporate legerdemain in order to avoid Federal Power Commission jurisdiction over local facilities and operations. * * *" [13]

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[13] *Utah Gas Service Co.*, 39 F.P.C. 388-389 (1968). The Commission had actually applied Section 1(c) to United on a prior occasion. *United Gas Pipe Line Co.*, 35 F.P.C. 172 (1966).

5. No regulatory gap [14] is created by the application of the Section 1(c) exemption to the Green System-East.

(a) The Federal Power Commission has no jurisdiction to set rates under direct sales contracts between United and its industrial customers.[15] Neither does the Louisiana Commission, as we have already observed.[16] The same regulatory gap exists in either situation.

(b) The Federal Power Commission would retain its jurisdiction over the curtailment of gas supplies from interstate sources being delivered into the Green System-East. This jurisdiction the Commission already employes in regulating the delivery of gas by interstate pipelines at or within a state to gas companies exempt under Section 1(c).[17]

(c) The Federal Power Commission's rate regulation powers would remain unaffected. For many years the Commission has allocated costs to sales by United which the Commission lacked the power to regulate.[18]

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[14] See *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965).

[15] See *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. at 640.

[16] See n. 3, *supra*.

[17] Thus the Commission has ordered El Paso Natural Gas Company to adopt a certain curtailment plan applicable, *inter alia*, to gas deliveries made by El Paso to companies exempt under Section 1(c) which transport and deliver gas in California where the Public Service Commission also does not regulate direct sales by pipelines. See Opinion No. 634 issued October 31, 1972 in *El Paso Natural Gas Co.*, Docket No. RP72-6, appeal pending *sub nom.*, *American Smelting Co.* v. *FPC*, D.C. Cir. Nos. 72-2204, *et al.*

[18] See *United Gas Pipe Line Co.*, 25 F.P.C. 26 (1961).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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